

a

ASEAN SECURITY PAPER MILLS SDN. BHD.

v.

PROVINCIAL INSURANCE (M) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR

ANUAR ZAINAL ABIDIN J

[CIVIL SUIT NO. D2-22-2458-89]

4 JANUARY 1990

b

CIVIL PROCEDURE: *Default judgment - Set aside - Defendants allege non-receipt of writ - Grounds for setting aside regular judgment - Merits of the case - Triable issues.*

c

The plaintiff's writ was served on the defendants on 22 November 1989 and no appearance having been entered by the defendants, the plaintiffs obtained a default judgment on 30 November 1989. The defendants applied to set aside the judgment on the grounds that they had not received the writ; the Senior Assistant Registrar granted the order and the plaintiffs now appeal.

Held:*d*

[1] a) The judgment in default was a regular judgment as the defendant's employee, one N had accepted service of the writ on behalf of the company on 22 November 1989. If for any reason the matter was not brought to the attention of the management of the company, it is certainly not the fault of the plaintiffs.

(b) the defendants have not given any good reason for the failure to enter appearance and the default judgment should not be set aside.

e

[2] However, where an application is made for setting aside a judgment in default the Court must consider the merits of the case, that is, raising an arguable or triable issue.

[3] On the facts of this case, the defendants have raised several issues to be tried, namely whether the plaintiffs have breached any of the conditions in the policy; it is not clear from the affidavits alone whether or not there was a breach and when the fire actually occurred.

f

These elements would have to be proved at a trial.

[Appeal dismissed.]

For the plaintiffs/appellants - Yap Foo Ken with J.S. Oliver; M/s. C.K. Leong & Co.

For the defendants/respondents - C.V. Das with Romesh Abraham; M/s. Shook Lin & Bok

*g***JUDGMENT****Anuar Zainal Abidin J:**

This is an appeal (Encl. 20) by the plaintiffs against the decision of the learned Senior Assistant Registrar given on 12 December 1989 granting the defendants an order to set aside the judgment in default dated 30 November 1989.

h

The plaintiffs filed their writ of summons on 21 November 1989. The writ was served on the defendants on 22 November 1989.

No appearance having been entered the plaintiffs obtained a judgment in default on 30 November 1989.

i

The defendants contended that they have not received the writ of summons and therefore was not aware that the plaintiffs had filed a suit against them. In the event, the defendants did not file an appearance.

The grounds given by the defendants are not supported by the facts as disclosed in the several affidavits before the Court.

a

It is not denied that the defendants' employee one Norziah bte Mohd. Rusli accepted service on behalf of the company on 22 November 1989. If for any reason the matter was not brought to the attention of the management of the company, it is certainly not the fault of the plaintiffs. In my view the writ was served on the defendants on 22 November 1989. The judgment in default of appearance was therefore a regular judgment.

b

A regular judgment entered in default of appearance should not be set aside unless good reason is given. In this case I do not think the defendants have given any good reason for the failure to enter appearance. The judgment should not be set aside on this ground.

It has, however, been decided (1) that where an application is made for setting aside a judgment in default the Court must consider the merits of the case. Now, a defence on the merits simply means raising only an arguable or triable issue.

c

In the present case the defendants contended that they have repudiated liability under the policy of insurance for several reasons. The main reason being that the plaintiffs have by their conduct breached certain conditions, in particular condition 12 of the policy of insurance. The defendants contended that the plaintiffs had refused to allow the defendants' agent access to the site of the factory which under the policy they claimed they have the right.

d

The defendants further contended that the plaintiffs are in breach of condition 11 of the said policy which requires the plaintiffs to produce particulars, proofs, invoices, documents and information with respect to the claim. The defendants contended that the policy of insurance in this case is a policy of indemnity and therefore requires proof of loss. The plaintiffs however have not furnished the defendants with any particulars and details pertaining to the loss claimed.

e

The defendants further contended that they have reasons to believe that the fire which caused the damage to the goods insured occurred at different time from that alleged by the plaintiffs. The defendants contended that this is an issue to be tried.

With respect I agree with the defendants. I am of the view that the defendants have raised several issues to be tried.

f

Whether the plaintiffs have breached any of the conditions in the policy is to my mind a serious issue to be tried. It is not clear from the affidavits alone whether there was or there was not a breach. The defendants would have to lead evidence at the hearing to prove that the plaintiffs have committed such a breach.

g

It is also necessary for the case to go to trial in order to prove the fact as regards the actual time when the fire occurred. This issue is material to determine whether there was fraud.

In my judgment the learned Senior Assistant Registrar is right in ordering that the judgment in default be set aside and that the defendants be given leave to defend.

For the reasons above I would dismiss this appeal with costs.

h

Also found at [1990] 2 CLJ 971

i